STATE OF MICHIGAN

COURT OF APPEALS

JOHN B. VISSER and CHERYL VISSER,

Plaintiffs-Appellants,

V

TIMBERLAKE SALES, INC.,

Defendant/Counterdefendant/Third-Party Plaintiff-Appellee,

and

LABUDDE FEED & GRAIN COMPANY,

Defendant/Counterplaintiff-Appellee,

and

WHOLESALE FEED INGREDIENTS, INC.,

Defendant/Counterdefendant-Appellee,

and

A.E. STALEY MANUFACTURING COMPANY,

Defendant/Counterdefendant/Third-Party Defendant-Appellee.

UNPUBLISHED
November 2, 2001

No. 224424
Ottawa Circuit Court
LC No. 98-032172-NZ

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the trial court's order granting defendant A.E. Staley Manufacturing Company (Staley) summary disposition of plaintiffs' negligence claim. We affirm.

Plaintiffs operate a dairy farm. In May 1997, a nutritionist recommended that plaintiffs add cornstarch to their cattle feed to increase their herd's milk production. Plaintiffs ordered feed, including cornstarch fit for animal consumption, from defendant Wholesale Feed Ingredients, Inc. Because of a series of errors and oversights, the cornstarch that defendant Timberlake Sales, Inc. purchased from Staley for eventual resale to Wholesale was a type containing toxic ingredients, and unfit for animal consumption. Wholesale blended the toxic cornstarch into the cattle feed, which plaintiffs then fed to their cattle. Shortly after the herd ate the contaminated feed, milk production dropped, and many cows became ill or died or had to be sold. Plaintiffs' complaint included counts against all defendants for negligence, breach of express and implied warranties, and breach of contract.

Defendant Staley filed a motion for summary disposition, arguing that according to the economic loss doctrine the Uniform Commercial Code (UCC), MCL 440.1101 *et seq*., provided the exclusive remedy for plaintiffs' claims. The trial court granted Staley's motion to dismiss plaintiffs' negligence claim, but denied the motion with respect to plaintiffs' other claims. We review the trial court's decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although Staley moved for summary disposition pursuant to MCR 2.116(C)(8), and the trial court's order indicated the motion was granted pursuant to that subrule, the parties and the trial court relied on evidence outside the pleadings. Therefore, we will treat the motion as having been granted pursuant to MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

Tort claims arising from a commercial transaction in goods, pursuant to which the plaintiff has suffered only economic loss, are barred by the economic loss doctrine. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 520; 486 NW2d 612 (1992). "The economic loss doctrine provides that where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC." *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 401; 586 NW2d 549 (1998). "[T]he UCC provides remedies sufficient to compensate the buyer of a defective product for direct, incidental, and consequential losses, including damage to property other than the defective product itself, where the damage was within the contemplation of the parties to the agreement and the occurrence of the damage could have been the subject of negotiations between the parties." *Id*. at 401-402; see also *Neibarger*, *supra* at 532.

The trial court found that while the parties did not expressly contemplate the precise nature and extent of the damages plaintiffs sustained, "such damages *could* have been the subject of their negotiations, and that is all that is necessary to bring this case within the scope of the economic loss doctrine." (Emphasis in original.) Plaintiffs contend that the trial court erred in applying the economic loss doctrine to their negligence claim because when the parties contracted they did not contemplate the type of damage that occurred, and thus could not have negotiated over the unknown risk that plaintiffs would receive contaminated cornstarch.

In *Neibarger*, our Supreme Court decided two consolidated cases involving dairy farmers who brought claims against the designers, builders and installers of milking systems. After the plaintiffs began using the new milking systems, their cows suffered decreased milk production, and some of their animals became sick and died or had to be sold for beef. *Neibarger*, *supra* at 516-518. The Supreme Court found that according to the economic loss doctrine, the UCC provided the exclusive remedy in both cases. *Id*. at 527-528.

> A contrary holding would not only serve to blur the distinction between tort and contract, but would undermine the purpose of the Legislature in adopting the UCC. The code represents a carefully considered approach to governing "the economic relations between suppliers and consumers of goods." If a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages, require notice to the seller, and limit the time in which such a suit must be filed, could be entirely avoided. In that event, Article 2 would be rendered meaningless. . . . [*Id*. at 528 (footnote omitted).]

The Court further explained that it did not matter that the plaintiffs suffered losses to property other than the goods purchased:

> The proper approach requires consideration of the underlying policies of tort and contract law as well as the nature of the damages. The essence of a warranty action under the UCC is that the product was not of the quality expected by the buyer or promised by the seller. The standard of quality must be defined by the purpose of the product, the uses for which it was intended, and the agreement of the parties. In many cases, failure of the product to perform as expected will necessarily cause damage to other property; such damage is often not beyond the contemplation of the parties to the agreement. [*Id*. at 531 (footnote omitted).]

Plaintiffs cite *Detroit Bd of Educ v Celotex Corp (On Remand)*, 196 Mich App 694; 493 NW2d 513 (1992), a case in which this Court declined to apply the economic loss doctrine. In that case, the plaintiffs were public school districts and private schools and the defendants were manufacturers, distributors or installers of a variety of asbestos products that were purchased for use in the plaintiffs' school buildings. *Id*. at 698. Finding that the plaintiffs' proper remedy lay in tort, not the UCC, this Court noted that the plaintiffs' claims asserted that the defendants' products were safety hazards, and observed that "it is highly unlikely that the parties could have anticipated and bargained over the hazards of asbestos at the time the products were sold, which was apparently years before the risks of the material were known." *Id*. at 705.

In this case, the trial court found that the danger of acquiring feed inappropriate or even toxic for plaintiffs' dairy herd was, or could have been, within the parties' contemplation when they contracted. Pursuant to their nutritionist's advice, plaintiffs in acquiring feed containing cornstarch sought to increase the herd's milk production. While plaintiffs undoubtedly did not expect to receive cornstarch unfit for animal consumption, plaintiffs had awareness that the quality of their animals' feed affected the herd's health and ability to produce milk. Thus, the quality of their animals' feed was within plaintiffs' contemplation when they contracted to purchase the cornstarch. Consequently, this case is distinguishable from *Celotex*, where the potentially dangerous quality of asbestos was not known when the plaintiffs purchased the products for their schools. As the *Celotex* panel noted,

> tort remedies for defective products are premised on a policy of allocating the risk of unsafe products to manufacturers and sellers in order to encourage the design of safer products . . . . Essentially, then, policy holds that "defects of suitability

> and quality are redressed through contract actions and safety hazards through tort actions." [*Id*. at 704.]

Because plaintiffs' negligence claim is based on their allegation that they received cornstarch that was not suitable and of the wrong quality for its intended purpose, we conclude that the claim is essentially a contract claim, and that the trial court did not err in applying the economic loss doctrine to preclude this claim.

Plaintiffs also argue that they had no privity of contract with Staley. In *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333; 480 NW2d 623 (1991), this Court found that where all parties to a transaction are commercial entities, a contractual relationship was not necessary to invoke the economic loss doctrine "because, in transactions among such parties, one of the issues in the bargaining process is the allocation of the risk of nonperformance." *Id*. at 342-343.

> [C]ommercial law is concerned with economic expectations. Commercial enterprises allocate the risk of loss due to nonperformance among themselves and pass this cost on to the consumers by way of higher prices. In this manner, commercial problems can be solved with predictable consequences. The reliance on privity notions to ascertain whether tort or commercial law applies serves only to blur the distinction between, and the applicability of, commercial law and tort law to economic losses. Instead, a more logical and conceptually manageable approach is to determine the type of loss a plaintiff is alleging. Allegations of only economic loss do not implicate tort law concerns with product safety, but do implicate commercial law concerns with economic expectations. [*Id*. at 343-344.]

Plaintiffs ask this Court to ignore the holding in *Sullivan*, arguing that it was wrongly decided. As noted in *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich App 40, 45; 585 NW2d 314 (1998), however, this Court has "expressly rejected the argument that the economic loss doctrine does not apply in the absence of privity of contract" in both *Sullivan*, *supra*, and *Freeman v DEC Int'l, Inc*, 212 Mich App 34; 536 NW2d 815 (1995). We are bound to follow those decisions, MCR 7.215(I)(1), with which we note our agreement.[1]

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

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[1] We decline to address plaintiffs' unpreserved arguments regarding the Michigan Commercial Feed Law, MCL 287.521, because we have located in the record no indication that plaintiffs raised this argument before the trial court, and the trial court did not address it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).